

A.J. Elkins

From: 2804 Discovery, MDL <mdl2804discovery@motleyrice.com>
Sent: Friday, August 30, 2019 8:42 AM
To: MDL 2804
Subject: FW: EXTERNAL-Re: Statement of Stipulated Facts and Exhibit List

From: David R. Cohen (David@SpecialMaster.Law) <david@specialmaster.law>
Sent: Friday, August 30, 2019 12:41:08 PM
To: Kate Swift <kate.swift@bartlitbeck.com>; Shkolnik, Hunter <Hunter@NapoliLaw.com>; Conroy, Jayne <jconroy@simmonsfirm.com>
Cc: Do Amaral, Paulina <Pdoamaral@lchb.com>; Mark Lanier <wml@lanierlawfirm.com>; Migliori, Don <dmigliori@motleyrice.com>; Mougey, Peter <pmougey@levinlaw.com>; 2804 Discovery, MDL <mdl2804discovery@motleyrice.com>; xALLDEFENDANTS-MDL2804-Service@arnoldporter.com <xALLDEFENDANTS-MDL2804-Service@arnoldporter.com>
Subject: EXTERNAL-Re: Statement of Stipulated Facts and Exhibit List

Good morning.

I know you all have a telecon later today to discuss depo designations and so on.

I have resisted weighing in on your dispute on that topic because, frankly, it seems like you all (talking to you, trial counsel) ought to be able to figure this out on your own. Also, no surprise, I have been reviewing a motion or two that are pending, which has been consuming my bandwidth.

That said, here are some suggestions and comments that may help.

- I am ok with virtually any agreed change/compromise to existing schedule and dates, as long as the **end**-dates do not move very much. In other words, the end-dates for final submission of lists and designations and etc to the Court can't be move more than a little bit, because the Court needs the time it has reserved at the end to review and rule before trial. You can move them around a bit though, or change their order, if necessary.
- I have not discussed these topics in detail with the Judge, but my inclination and belief is that: (1) the Court will allow Plaintiffs one live-stream appearance of a distant witness per defendant; (2) the Court is inclined to insist that, if a D calls a witness live in its own case, then it must make that witness available live in Ps case; (3) unless the P/D split is very lopsided so that Ps have a lllittle and Ds a lot, Ps must play all of the depo designations for a witness at the same time (meaning Ds designations in Ps case); and (4) the Court will be VERY unhappy if Ds force Ps to call a witness simply to authenticate documents -- Ds need to stipulate to authenticity of their docts, including SOMS policies and so on, unless they truly believe there is a forgery or some other serious question on the matter (and vice-versa for Ps on their docts.)
- There should, in the end, be a final limit on the number of witnesses/hours for both side's depo designations -- e.g. 10 hours per side 😊

My hope is you submit to me a fully-agreed-to suggested order that addresses all of the pre-trial issues, which I will then sell hard to JP.

Good luck.

-d

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This email sent from:
David R. Cohen Co. LPA
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From: Kate Swift <kate.swift@bartlitbeck.com>
Sent: Monday, August 26, 2019 5:10 PM
To: Hunter Shkolnik <Hunter@NapoliLaw.com>; Jayne Conroy <jconroy@simmonsfirm.com>
Cc: Paulina doAmaral <Pdoamaral@lchb.com>; W. Lanier <wml@lanierlawfirm.com>; 'Don Migliori' <dmigliori@motleyrice.com>; xALLDEFENDANTS-MDL2804-Service@arnoldporter.com <xALLDEFENDANTS-MDL2804-Service@arnoldporter.com>; David R. Cohen (david@SpecialMaster.biz) <david@specialmaster.biz>; Peter Mougey <pmougey@levinlaw.com>
Subject: RE: Statement of Stipulated Facts and Exhibit List

Hunter and Jayne,

The issue on the table was whether plaintiffs will provide real deposition designations (i.e., those you reasonably expect to play at trial) within any timeframe that would allow defendants to object and counter—and the court to rule—before trial. In response, Mark Lanier asked twice “which witnesses” we would make available in your case in chief, not “generically” whether we would make any witnesses available at all.

Your new request suggests that plaintiffs will not comply with the court’s order to provide deposition designations you expect to play unless defendants agree to make ALL of our witnesses available live. That really turns the court’s order on its head. It’s your case. Which Walgreens witnesses do you seek to call live?

As for our Friday call, can we set it for 9 am pacific / 11 am central / 12 pm eastern? If that works, I will send a dial-in.

Thanks and have a good evening,
Kate

BartlitBeck LLP

Katherine M. Swift | p: 312.494.4405 | c: 773.531-6118 | Kate.Swift@BartlitBeck.com | Courthouse Place, 54 West Hubbard Street, Chicago, IL 60654
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From: Hunter Shkolnik <Hunter@NapoliLaw.com>
Sent: Monday, August 26, 2019 12:37 PM

To: Kate Swift <kate.swift@bartlitbeck.com>; Jayne Conroy <jconroy@simmonsfirm.com>
Cc: Paulina doAmaral <Pdoamaral@lchb.com>; W. Lanier <wml@lanierlawfirm.com>; 'Don Migliori' <dmigliori@motleyrice.com>; xALLDEFENDANTS-MDL2804-Service@arnoldporter.com; David R. Cohen <david@specialmaster.biz>; Peter Mougey <pmougey@levinlaw.com>
Subject: Re: Statement of Stipulated Facts and Exhibit List

Special Master Cohen,

I just realized you were not copied on my reply to Kate Swift's email related to deposition designations and wanted to forward this on to you.

Hunter

----- Original message -----

From: Hunter Shkolnik <Hunter@NapoliLaw.com>
Date: 8/26/19 6:39 AM (GMT-05:00)
To: Kate Swift <kate.swift@bartlitbeck.com>, Jayne Conroy <jconroy@simmonsfirm.com>
Cc: Paulina doAmaral <Pdoamaral@lchb.com>, "W. Lanier" <wml@lanierlawfirm.com>, 'Don Migliori' <dmigliori@motleyrice.com>, xALLDEFENDANTS-MDL2804-Service@arnoldporter.com
Subject: Re: Statement of Stipulated Facts and Exhibit List

Kate

The issue on the table first brought forward as result of Mark Cheffo's emails and then by you is whether defendants will advise us generically if they will make their witnesses who have been deposed available to testify live during plaintiffs case. This request has been met with one unclear response after another. Specifically, as to Walgreens we would prefer that you make ALL your deposed witnesses available and no depositions be used. Can you confirm that you will make the witnesses available or not. I think your multiple email responses conflate 3 matters and we just want that one issue clarified. If Walgreens answer is "we will not make any of our witnesses available to plaintiffs except those who reside in Ohio who plaintiffs can compel by subpoena" then just say it. Why is this so difficult.

As to defense gamesmanship of failing to designate other defendants witnesses and now realizing you made a mistake we can take that issue up secondarily.

I will be on the call but Friday is best for me.

Hunter

----- Original message -----

From: Kate Swift <kate.swift@bartlitbeck.com>
Date: 8/25/19 10:49 PM (GMT-05:00)
To: Jayne Conroy <jconroy@simmonsfirm.com>
Cc: Paulina doAmaral <Pdoamaral@lchb.com>, "W. Lanier" <wml@lanierlawfirm.com>, 'Don Migliori' <dmigliori@motleyrice.com>, Hunter Shkolnik <Hunter@NapoliLaw.com>, xALLDEFENDANTS-MDL2804-Service@arnoldporter.com
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Jayne,

Thanks for reaching out to get a plan together. We are working on identifying the right people on our side. In the meantime, assuming you are one of the right people on your side, would Thursday or Friday work for an initial call?

We'd also like to continue the discussion on a couple of issues related to deposition designations. First, plaintiffs have asked whether defendants will identify defense witnesses we would make available in your case in chief. We are not inclined to do so at this time. Your position is made especially difficult in light of the scores of depositions that have been taken (and heavily designated), your pending motion to call unidentified witnesses by video, and the limited time we will have at trial.

Second, in light of the Court's severance order, and the possibility of additional parties settling or otherwise being dismissed before the Track One trial, we would like to put a plan in place for designating testimony of witnesses affiliated with those parties. To that end, defendants plan to serve deposition designations and corresponding exhibits of witnesses affiliated with parties that have *already been severed* by September 20, as those witnesses may now be deemed unavailable. With respect to severed party witnesses who were initially designated by plaintiffs but dropped on Tuesday, 8/20, presumptively there should be no need for plaintiffs to object, as defendants' designations will be but a small subset of testimony plaintiffs themselves previously designated. Defendants request that plaintiffs serve any counter-designations for these witnesses by October 4.

Going forward, defendants will serve designations and exhibits for any witnesses affiliated with a party that is *later severed, settles out of the case, or is otherwise dismissed* no later than three weeks from the date the Court dismisses that party from the Track One trial. We request that counter-designations be served two weeks later. We are amenable to discussing shorter deadlines for any parties dismissed within the four weeks before the start of trial, or thereafter.

BartlitBeck LLP

Katherine M. Swift | p: 312.494.4405 | c: 773.531-6118 | Kate.Swift@BartlitBeck.com | Courthouse Place, 54 West Hubbard Street, Chicago, IL 60654

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From: Jayne Conroy <jconroy@simmonsfirm.com>

Sent: Friday, August 23, 2019 1:14 PM

To: xALLDEFENDANTS-MDL2804-Service@arnoldporter.com

Cc: Jayne Conroy <jconroy@simmonsfirm.com>; Paulina doAmaral <Pdoamaral@lchb.com>; W. Lanier <wml@lanierlawfirm.com>; 'Don Migliori' <dmigliori@motleyrice.com>; Hunter Shkolnik <Hunter@NapoliLaw.com>

Subject: Statement of Stipulated Facts and Exhibit List

External E-mail

Please give consideration to designating defense point persons for discussions/meet and confers regarding both the Statement of Stipulated Facts and the Exhibit List, and we will do the same. At a minimum, we will want to schedule some interim calls or meetings to work through the facts as well as issues concerning the exhibits before they are provided to SM Cohen. Thanks.

Jayne Conroy

jconroy@simmonsfirm.com

Simmons Hanly Conroy

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Hunter Shkolnik

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